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ABSTRACT

Written for social service workers involved with Indian child welfare cases in which adoption through a state court is being considered, this manual presents basic information about the requirements of the Indian Child Welfare Act of 1978 (ICWA) in cases of Indian adoption. Background material explains that the ICWA--intended to establish standards to help keep Indian families intact and prevent unnecessary out-of-home placement--is, apparently, misinterpreted by many social service agencies as prohibiting the adoption of any Indian child. A summary is provided of the way adoption is perceived in Indian communities and the circumstances in which adoption of an Indian child is appropriate. Specific information is provided about ICWA requirements for voluntary and involuntary termination of parental rights, preferred adoptive homes, diligent search for a suitable adoptive home, and obligations of the state upon finalization of an Indian adoption. The manual includes a directory of Bureau of Indian Affairs Area offices and seven organizations that maintain national or regional registries of prospective Native American adoptive families and/or children. (JHZ)

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Adoption and the American Indian Child

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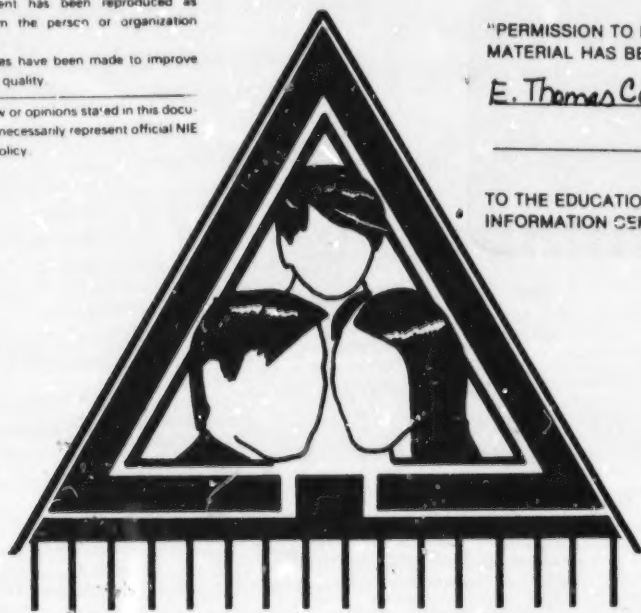
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A manual for social service workers who
are working with Indian child welfare cases
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As part of its Linkages project to disseminate information on topics important to the welfare of American Indian children, the National American Indian Court Judges Association offers this brochure on the subject of adoption. The information provided is intended for social service personnel who are handling Indian child welfare cases in which adoption through a state court is being considered. Special effort is given to delineating the requirements which PL 95-608 (the Indian Child Welfare Act of 1978) imposes on the state adoption process.

The text was written by Louise Zokan delos Reyes, Child Welfare Specialist for the Division of Social Services, Bureau of Indian Affairs, Washington, DC. It has been arranged in the provided format by Linkages editor, Nancy Gale.

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Adoption and the American Indian Child: A Manual for Social Service Workers

In 1978 a federal law, entitled the Indian Child Welfare Act, was enacted to address the alarmingly high rate at which American Indian children were being removed from their families for adoption and foster placement by nontribal public and private agencies. This law, which became known as the ICWA, focused on establishing standards which would work toward keeping Indian families intact and which would lessen the numbers of children being removed from their homes.

Since its enactment, the ICWA has generally been felt to have benefited Indian peoples by shifting emphasis towards strengthening and reconciling families. Indiscriminate removal of Indian children appears to have lessened dramatically.

But, paradoxically, with these positive changes comes a new concern. The Indian Child Welfare Act, it appears, is mistakenly being interpreted by many social service agencies as prohibiting the adoption of *any* Indian child. This mistaken notion, it is feared, will remove a viable means for providing a permanent living situation for the Indian child who, for whatever reason, cannot live with his/her parent(s) or extended family.

Adoptions, it is clear, continue to have value for Indian children in certain situations. Adoption, for example, is an appropriate option in cases where continued custody of a child by his/her parent* may result in serious emotional or physical damage to the child. It may also be appropriate when remedial services and rehabilitative programs have failed to prevent family breakup. Or it may be the chosen alternative when a child's parent feels unable to provide the type of nurturing, stable environment he/she wants the child to have.

*The word "parent" will be used in this brochure to mean any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.

When necessary, social service workers may still select adoption as the option for some Indian children. When adoption is chosen for an Indian child, however, the social worker must assume certain added responsibilities. These include a willingness: to focus on the child's tribal affiliation(s); to pay careful attention to specific tribal cultural perceptions and preferences; and to vigorously work to assure that the mandates of the Indian Child Welfare Act are carefully followed.

The questions and answers offered in the following pages are intended to help social service personnel through the Indian adoption process in a state court. (Procedures for adoptions through a tribal court are determined by the codes of the individual tribal courts.)

HOW IS ADOPTION PERCEIVED BY INDIAN PEOPLE?

A social worker who is recommending adoption for an Indian child will be helped by anticipating the possible reactions such a suggestion may initially elicit from Indian people.

First, the worker should be aware that the U.S. concept of adoption, as it has been historically practiced with American Indian children, is not viewed favorably by Native American tribes. Indeed most tribes feel that, on the whole, the legal process, by which non-Indian peoples have until recently adopted Indian children, has been harmful to the children and tribes involved: a foreign means of separating Indian children from the families, communities, and cultures to which they belong.

In addition, the way most Indian people view the parent-child relationship is distinctly different than the way most of the rest of U.S. society views it. In the Anglo legal system on which U.S. law is built, a child who is to be adopted must first be severed from his parent through a legal process which terminates the parent/child rights. This severance relieves both the parent and the child from future obligations to one another and dissolves the child's family bonds.

Many Indian people do not accept the proposition that a parent-child relationship can be legally terminated or, if so terminated, that family ties would also be affected. Instead, most tribal people traditionally see the child as part of a large kinship system which involves multiple inter-relationships. These multiple relationships may supplement or complement the relationship between the biological parent and the child, but remain viable and intact regardless of what may happen between the parent and the child.

Accordingly, in most Indian tribes it is expected that a child who is not cared for by his/her biological parents will automatically be cared for by

other members of the kinship system. It is hard for traditional Indian people to understand the idea that responsibility for a child might have to be turned over to someone outside the "extended" family.

These expectations will make tribal people reluctant to accept adoption as an option for an Indian child *unless* it is clear that it is the best alternative. The social worker must, therefore, be prepared to demonstrate his/her reasons for suggesting adoption and must keep in mind that what Indian people see as best for their children will be influenced by cultural values which may be very different from those held by the social worker.

HOW DOES THE INDIAN CHILD WELFARE ACT ADDRESS ADOPTION?

The primary focus of the Indian Child Welfare Act is on establishing standards which help keep Indian families intact and prevent unnecessary out-of-home placement. However, the Act does recognize situations in which an Indian child would benefit by being placed in an alternative permanent living situation, such as that offered by adoption.

WHEN WOULD ADOPTION BE CONSIDERED APPROPRIATE UNDER THE ICWA?

Adoption is considered an appropriate course of action for an Indian child when all efforts at providing support services and/or rehabilitative programs to prevent separation of the family have failed and when an alternative permanent living situation is felt to be in the child's best interests.

In involuntary terminations of parental rights, evidence must, additionally, be presented to show that the continued custody of the child by his/her parent or Indian custodian is likely to result in serious emotional or physical damage to the child. In voluntary relinquishments, evidence must be provided that consent was given with full understanding of the consequences.

WHO IS CONSIDERED AN 'INDIAN CHILD'?

An Indian child is an unmarried person under 18 who is a tribal member, or is eligible for tribal membership and is the biological child of a member of an Indian tribe.

To determine if any specific child is an Indian child, the following information should be gathered: the child's name and birthdate; the names,

birthdates, and tribal affiliation of his/her biological parent; and some verification of the parent-child relationship by birth certificate or court order. This information should be presented directly to the tribe with which the child is known to be affiliated or, where that is not known, to a Bureau of Indian Affairs' Social Services Area Office, which will assist in determining the child's Indian heritage.

Social service workers seeking to establish an Indian child's tribal membership should be aware that each tribe establishes its own membership requirements and there is no comprehensive central listing of people who are of Indian heritage.

If a child is eligible for membership in more than one tribe, his/her tribe for purposes of the ICWA is the tribe with which he has the most significant contacts.

HOW IS AN INDIAN CHILD LEGALLY RELEASED FOR ADOPTION THROUGH A STATE COURT?

Adoption, in a state court system, is only an option for children where parental rights have been voluntarily or involuntarily terminated.

In a voluntary relinquishment, a child's parent gives consent to termination of his/her parental rights. In an involuntary termination, a state court decrees that the parent's rights to the child are terminated against the will of the parent or without his/her consent.

When parental rights to an Indian child are terminated in a state court, procedures prescribed by the Indian Child Welfare Act must be followed. These procedures differ depending upon whether the termination is voluntary or involuntary.

In both cases, ICWA procedures must be carefully followed or the adoption may be invalidated.

WHAT ARE THE ICWA REQUIREMENTS IN AN INVOLUNTARY TERMINATION OF PARENTAL RIGHTS?

When parental rights to an Indian child are terminated by a state court against the will of the parent, a very special procedure must be followed. This procedure is more involved than the one used to involuntarily terminate parental rights to a non-Indian child.

The first step in an involuntary termination proceeding involves verifying the child's Indian status. Whenever there is *any* suspicion that a child being considered for adoption may be Indian, a careful investigation must be undertaken to determine tribal membership. Such an investigation can be

time-consuming and frustrating because there is no central registry of Indian people. Help can, however, be obtained through the Bureau of Indian Affairs' Social Service Area Offices. (See section on *Who Is Considered An 'Indian Child'*? for more detail.)

Once the child's tribe has been identified, that tribe (and the child's parent or Indian custodian*) must be given written notice that proceedings involving termination of parental rights are being considered. They must also be informed that they have a right to intervene in these proceedings; and any time limitations for this intervention must be spelled out.

In addition, if the child's tribe operates a tribal court which is exercising jurisdiction over child welfare matters, the proceedings will be transferred to that court unless the tribal court or the child's parent objects or if good cause is shown to the state court to prevent the transfer.

If—after the above steps have been taken—the termination proceedings are retained in the state court, the party seeking termination must show that active efforts have been made to provide remedial services and rehabilitation to the family and that these efforts have failed. In addition, the state must prove that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. This latter charge must be supported by evidence beyond a reasonable doubt and by testimony of an expert witness.

WHAT ARE THE ICWA REQUIREMENTS IN A VOLUNTARY TERMINATION OF PARENTAL RIGHTS?

If a parent chooses to voluntarily give an Indian child for adoption through a state court, the consent to terminate parental rights must be given no earlier than ten days after the birth of the child. Such consent must, in addition, be executed in writing and recorded before a judge or magistrate of a court of competent jurisdiction. Further, the state court must certify that the terms and consequences of the consent were explained in detail in the language of the parent.

The consent should contain the name and birthdate of the Indian child; the child's tribal affiliation and any tribal enrollment or membership number; the name and address of the consenting parent; and the name and address of the person or agency which will arrange the adoptive or pre-adoptive placement.

*Indian custodian means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.

In a voluntary relinquishment procedure, the Indian child's parent may withdraw consent any time prior to a final decree of voluntary termination or adoption. The parent may do this by filing, with the state court, an instrument executed under oath stating his/her intention to withdraw consent. The clerk of court shall notify the party through whom the adoptive placement had been arranged, and the child shall be returned to the parent as soon as practicable.

Up to two years after the final decree of adoption, a parent who had voluntarily agreed to termination of his/her parental rights may withdraw consent on the grounds that such consent was obtained through fraud or duress and may subsequently petition the state court to vacate the adoption decree. Upon the filing of such a petition, the court must give notice to the interested parties and hold a hearing. If the court decides that fraud or duress was involved in the release, it must order the child returned to the petitioning parent.

In any voluntary relinquishment, the social service agency should assure that counseling is provided to the parent so he/she is well informed of his/her rights.

The parent should also be made aware that the adopted child, upon reaching 18, will be able to enroll as a tribal member and (unless confidentiality is requested by the biological parent), may be able to obtain information on the biological parents' names and tribal affiliations. (The ICWA is not an open-adoption law but it does provide for disclosure, upon request from the child once he/she is 18 or from the adoptive parents, of information necessary for the child's tribal enrollment. If an affidavit of confidentiality is included in the child's file, the Secretary of the Interior shall certify the information necessary for enrollment to the Indian child's tribe.)

WHO MAY ADOPT INDIAN CHILDREN?

The Indian Child Welfare Act outlines preferences for the kinds of families into which Indian children may be adopted under state law.

In the absence of good cause to the contrary, the Act states that preference shall be given to placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

Good cause to modify the above placement preferences is described in the November 1979 Federal Register's *Guidelines for State Courts* to include: (1) the requests (including requests for anonymity) of the parent or of the child when the child is of sufficient age; (2) the special physical or

emotional needs of the child as established by expert witness testimony; and (3) the unavailability, after a diligent search has been completed, of suitable placement families.

Tribes, on occasion, have established a different order of preference than the one set forth in the Act. The agency or court affecting a placement shall follow a tribally-amended preference order as long as the placement is to the least restrictive setting appropriate to the child's needs.

Standards for determining if the specific home is suitable as an adoptive home shall be the prevailing social and cultural standards of the community in which the parent or extended family resides or maintains cultural ties.

WHAT CONSTITUTES A DILIGENT SEARCH FOR A SUITABLE ADOPTIVE HOME?

A diligent search by a non-tribal placement agency seeking to meet the placement preference criteria set forth under the ICWA should begin with the Indian child's tribe. Here, the placement worker should speak with appropriate tribal social services and court personnel to determine what placement resources are available. Names and phone numbers for appropriate personnel can be obtained from the various BIA Area Offices, a listing of which is provided on page 10.

If no families satisfying the ICWA preference criteria can be found within the tribal setting, a review should be made of all relevant county and state adoptive resources to determine, first, if these resources list any adoptive families from the tribe involved and, second, if they list prospective Indian adoptive families from other tribes. (An Indian family is considered one in which at least one parent is a member of an Indian tribe or an Alaskan Native Regional Corporation.)

Regional and national adoption resource exchanges should also be contacted. A list of several organizations which maintain registers of prospective Indian adoptive families and children is provided on page 11. These organizations, in turn, can provide referral to other possible resources.

Throughout the search process, the non-tribal placement worker should maintain close contact with the appropriate tribal personnel. The tribe should be consulted as each stage in the search is undertaken. The worker should carefully document the search and record contacts made.

When an Indian home within the placement priorities cannot be found, the adoption should not be delayed unnecessarily. (Some professionals recommend that a search be no longer than six months.)

When the family chosen is not within the preference priorities identified

by the ICWA, the worker making the placement must clearly delineate the reasons for which the adoptive family was selected. A justification as to why the family best meets the needs of the waiting child should also be written. Appropriate tribal personnel may be asked to assist in this written documentation.

The placement worker must remember that the burden of proof, when an exception to the ICWA placement preferences is necessary, is on the worker. Clear documentation of a diligent search is protection, not only for the worker, but most important for the child so his/her placement is not at-risk for violation of the ICWA.

DOES A STATE HAVE ANY SPECIAL OBLIGATIONS ONCE AN INDIAN ADOPTION IS FINALIZED?

Yes, any state court that enters a final decree or order in an Indian adoptive placement is required by Section 301 of the Indian Child Welfare Act to file a copy of the order/decrece with the Secretary of the Interior.

This copy shall be accompanied by the following information: (1) the name and tribal affiliation of the child; (2) names and addresses of the biological parents; (3) names and addresses of the adoptive parents; and (4) the identity of any agency having information relative to the adoptive placement. If the court record contains an affidavit from the biological parents requesting that his/her identity remain confidential, the court shall include that as well.

In addition the Indian Child Welfare Act requires the state to take special action in cases where the adoption of an Indian child fails and the adoption decree is vacated or set aside. The action required involves notifying the biological parent or prior Indian custodian that he/she has the right to petition for return of the child. The parent or Indian custodian may waive their right to notice by executing a waiver of notice with the court.

HOW CAN AN ADOPTED INDIAN CHILD BECOME A MEMBER OF HIS/HER TRIBE?

When an adopted Indian child reaches age 18, he/she may apply to the court which entered his adoption or to the Secretary of the Interior to obtain information for tribal enrollment or for determining any rights or benefits which may be associated with that membership.

If the child's records contain an affidavit of confidentiality, the Secretary of the Interior shall certify to the tribe involved that, under the criteria established by that tribe, the child is eligible for membership.

WHAT RESOURCES ARE AVAILABLE?

Special resources may be available for Indian children or adoptive families. These may include subsidies through state or government programs to pay for legal adoption fees; medical or psychological costs related to the child's special needs; and/or maintenance costs for the adopted child. Resources may vary from state to state and from tribe to tribe.

If a social worker is unable to identify a subsidy or other needed resource for any particular Indian Child, he/she should contact a Bureau of Indian Affairs Social Service Area Office for assistance. The BIA office may be able to help identify an appropriate resource.

BUREAU OF INDIAN AFFAIRS AREA OFFICES

The Bureau of Indian Affairs Area Offices each serve BIA Agencies in a given area, which may include several states. The Agencies, in turn, serve a tribe or tribes. The list below provides mailing and telephone information for each Area Office and indicates the states served by each.

Aberdeen Area Office

Bureau of Indian Affairs
115 4th Avenue, S.E.
Aberdeen, SD 57401
(605) 225-0250
(NB, ND & SD)

Albuquerque Area Office

Bureau of Indian Affairs
5301 Central Avenue, N.E.
P.O. Box 8327
Albuquerque, NM 87108
(505) 766-3321
(CO & NM)

Anadarko Area Office

Bureau of Indian Affairs
Federal Building
P.O. Box 368
Anadarko, OK 73005
(405) 247-6673
(KS & West OK)

Billings Area Office

Bureau of Indian Affairs
316 North 26th Street
Billings, MT 59101
(406) 657-6651
(MT & WY)

Eastern Area Office

Bureau of Indian Affairs
1951 Constitution Avenue, N.W.
Washington, D.C. 20245
(703) 235-2794
(NY, NC, LA, MS & FL)

Juneau Area Office

Bureau of Indian Affairs
Federal Building
P.O. Box 3-8000
Juneau, AK 99801
(907) 566-7209
(AK)

Minneapolis Area Office

Bureau of Indian Affairs
831 Second Avenue, So.
Minneapolis, MN 55402
(612) 349-3607
(MN, IA, MI & WI)

Muskogee Area Office

Bureau of Indian Affairs
Federal Building
Muskogee, OK 74401
(918) 687-2507
(East OK)

Navajo Area Office

Bureau of Indian Affairs
Window Rock, AZ 86515
(602) 871-5151
(Navajo Reservation Only)

Phoenix Area Office

Bureau of Indian Affairs
3030 N. Central/P.O. Box 7007
Phoenix, AZ 85011
(602) 241-2261
(AZ, NV & VT)

Portland Area Office

Bureau of Indian Affairs
1425 Irving St., N.E.
P.O. Box 3785
Portland, OR 97208
(503) 231-6785
(OR, WA & ID)

Sacramento Area Office

Bureau of Indian Affairs
Federal Office Building
2800 Cottage Way
Sacramento, CA 95825
(916) 978-4691
(CA)

ADOPTION RESOURCES SPECIFIC TO INDIAN CHILDREN

The following is a listing of agencies and organizations which sponsor an adoption-related program or component which focuses specifically on Indian children and/or families.

Additional Indian-specific resources may be identified through your state social service department and the Bureau of Indian Affairs Area Office serving your area.

Organizations which maintain a national register of both prospective Native American families and children

American Indian Program
Friends of Children of Various Nations
600 Gilpin Street
Denver, Colorado 80218 (303) 321-8251

Indian Child Adoption Network
Seattle Indian Center
2222 Second Avenue
Seattle, Washington 98121 (206) 624-8700

Native American Adoption Resource Exchange
Council of Three Rivers
200 Charles Street
Dorseyville, PA 15238 (412) 782-4457

Organizations which maintain a national register of prospective Native American adoptive families

Indian Adoptive Family Circle
New Mexico Adoptive Family Circle
New Mexico Department of Human Services, Adoptions
P.O. Box 2349
Santa Fe, New Mexico 87503-2348 (505) 827-4109

Rocky Mountain Adoption Exchange
5350 Leetsdale Drive, Suite #10
Denver, Colorado 80222 (303) 333-0845

Organizations which maintain regional registers of prospective Native American adoptive families and/or children

Fos-Adopt Program
The Urban Indian Child Resource Center
390 Euclid Avenue
Oakland, California 94610 (415) 832-2386

Maintains a listing of prospective Indian adoptive families in Northern California, particularly the San Francisco Bay Area.

Rocky Mountain Adoption Exchange
5350 Leetsdale Drive, Suite #10
Denver, Colorado 80222

(303) 333-0845

Maintains a listing of American Indian children, from a five-state area, who are available for adoption. The states include Colorado, New Mexico, South Dakota, Utah and Wyoming.

Organizations which provide similar services and which are not included in the above listing, are asked to contact: Louise Zokan delos Reyes, Division of Social Services, Bureau of Indian Affairs, 1951 Constitution Avenue, NW, Washington, DC 20245. Telephone: (202) 343-6434.

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